

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

TRI/SAM DEVELOPMENT, INC.,

Plaintiff and Appellant,

v.

PABLO LEYDEN LACUARA et al.,

Defendants and Respondents.

B205614

(Los Angeles County
Super. Ct. No. BC357812)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Ralph W. Dau, Judge. Affirmed.

Schuler & Brown, Daniel E. Hoffman and Sam D. Ekizian for Plaintiff and
Appellant Tri/Sam Development, Inc.

Bremer, Whyte, Brown & O'Meara, Keith G. Bremer and Monique R. Linson;
Everett L. Skillman for Defendants and Respondents Pablo Leyden Lacuara and Leyden
Corporation.

Tri/Sam Development, Inc. (Tri/Sam) appeals from the adverse judgment in its action for breach of contract and negligence against one of the subcontractors hired for a residential remodeling project. Tri/Sam contends the trial court erroneously limited the testimony of its expert witness. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Contract To Install Waterproofing Materials

Tri/Sam, a general contractor, agreed to remodel a single family residence in Palos Verdes for \$4.5 million. Tri/Sam then subcontracted with Pablo Leyden Lacuara and Leyden Corporation, doing business as CDW Waterproofing (collectively CDW), to apply waterproofing materials to the property's several decks to protect them from water intrusion.

2. Tri/Sam's Lawsuit against CDW

After the remodeling had been completed, the homeowners notified Tri/Sam that water had penetrated the decks. Upon investigation Tri/Sam determined several of the decks were unsound due to substantial water intrusion and required extensive repair or replacement. Tri/Sam made necessary repairs at a cost of more than \$300,000. It then sued CDW for negligence and breach of contract, alleging CDW's failure to properly install the waterproof coating had caused the decks to fail. The case was tried to the court.

3. CDW's Motion In Limine Directed to Tri/Sam's Expert

On September 13, 2007, four court days before the September 19, 2007 trial date, CDW moved in limine to exclude the testimony of Victor Robinett, Tri/Sam's designated expert witness, on the ground the designation was improper.¹ The same day CDW deposed Robinett as a precaution (in the event the court denied their motion).

¹ Tri/Sam designated Robinett in a supplemental expert witness designation served August 10, 2007, informing CDW Robinett, a general contractor, would testify on negligence, causation and damages. CDW filed an objection and subsequently a motion in limine, arguing the designation was improper because Tri/Sam had already designated two other general contractors to opine on negligence, causation and damages. Tri/Sam

The court heard the in limine motion on September 20, 2007 at the beginning of trial. In addition to the points made in their motion papers, CDW argued at the hearing that Robinett's testimony should be excluded because he had been unprepared at his deposition: Robinett testified he could not provide his final opinions on certain matters, including the existence of construction defects, because he had not yet reviewed certain architectural plans, had not yet consulted with a structural engineer and did not know the specific product used by CDW on the decks.

In its opposition to the motion in limine, Tri/Sam asserted its designation was proper and CDW had failed to exhaust the scope of Robinett's designation by asking during his deposition whether he had identified all of the opinions he intended to offer at trial. Tri/Sam asserted CDW also failed to complete the deposition despite Tri/Sam's offers to make Robinett available before trial.

The trial court issued a narrowly tailored ruling, granting the motion to exclude Robinett's testimony "to the extent that the witness shall be limited to the opinions expressed at the deposition, so long as the questions put by the defendant [had] called for all opinions the witness expected to present at trial." The court explained it would allow Robinett to testify and would consider specific objections to Robinett's testimony as it unfolded.

4. The Trial Testimony

Robinett testified at trial the water intrusion was caused by the failure of the waterproof coating to adhere to the metal flashing, a failure he attributed either to improper preparation of the flashing surface or to improper application of the waterproofing material, both of which were the responsibility of CDW. Robinett acknowledged that Tri/Sam did not install a "cleavage sheet," that is, a protective membrane, between the waterproofing material and the thin-set used by Tri/Sam's other subcontractors to set the travertine tile on top of the deck, but opined the absence of a

responded its other witnesses had a scheduling conflict with the trial date, thus making the new designation necessary.

cleavage sheet was not a factor in the failure of the waterproofing system because waterproofing systems are now made to bond directly to the material placed over them without the necessity of a cleavage sheet.

CDW's designated expert, Michael Brown, a construction consultant and the only witness for the defense, expressly disagreed with Robinett. He opined the absence of a cleavage sheet to protect the waterproof membrane from the friction caused by the thin-set used to lay the travertine tile was a critical error and a substantial cause of the failure of the waterproofing system. Brown explained it was the duty of the general contractor or tile subcontractor, not the waterproofing subcontractor, to install the protective barrier before laying the mortar bed for the tile.

5. The Trial Court's Statement of Decision

The trial court found in favor of CDW. In its written statement of decision the court explained, "The court is persuaded by Michael Brown's testimony that there should have been a cleavage membrane consisting of one of the six specified materials installed between the waterproofing membrane and the tile installed on top of the waterproofing, and one was not installed. It was the general contractor's (plaintiff's) obligation to see that such a barrier was installed at this job. The absence of a cleavage membrane is likely to have been a substantial cause of the failure of the waterproofing. [¶] Plaintiff failed to carry its burden to show that defendants breached the contract or were negligent."

6. Tri/Sam's Motion for New Trial

Tri/Sam moved for a new trial, contending the evidence was insufficient to justify the court's decision. Tri/Sam argued Brown's opinion directly contradicted the recommendations of the company that manufactured the waterproof coating and noted the architectural plans for the project specifically called for installation of the waterproof coating "in accordance with manufacturer's recommendations." Tri/Sam attached to its motion for new trial a letter from the president of the company that manufactured the waterproof coating used in this case explaining the company does not recommend use of a cleavage sheet with its product. Tri/Sam also attached a technical data sheet for a product called Mer-krete Dual Membrane System, which advises that tile, stone or other

finishes may be applied directly to the waterproof membrane. The trial court denied the motion.

DISCUSSION

1. Standard of Review

Trial court rulings on the admissibility of evidence, whether in limine or during trial, are generally reviewed for abuse of discretion. (*People v. Williams* (1997) 16 Cal.4th 153, 196-197 [“In determining the admissibility of evidence, the trial court has broad discretion On appeal, a trial court’s decision to admit or not admit evidence, whether made in limine or following a hearing pursuant to Evidence Code section 402, is reviewed for abuse of discretion.”]; accord, *People v. Alvarez* (1996) 14 Cal.4th 155, 203 [“appellate court reviews any ruling by a trial court as to the admissibility of evidence for abuse of discretion”]; *Zhou v. Unisource Worldwide, Inc.* (2007) 157 Cal.App.4th 1471, 1476.)

2. Tri/Sam Has Not Demonstrated the Trial Court Committed Prejudicial Error When It Limited Robinett’s Testimony

Tri/Sam contends the trial court erred in granting CDW’s motion in limine because CDW never completed Robinett’s deposition and never inquired at that deposition whether he had other opinions he intended to offer at trial. Tri/Sam has framed its argument as if the court had restricted Robinett’s testimony to those opinions he actually expressed at his deposition. In fact, the court ruled it would limit Robinett’s testimony only to the extent CDW could show he had been asked about a particular subject matter at the deposition and refused to answer or claimed an inability to provide an opinion at that time. That very general ruling correctly states the law and was entirely proper. (See Code Civ. Proc., § 2034.300, subd. (d) [trial court shall, on objection by any party who has timely complied with the requirements of § 2034.260 (requirements for exchange of expert witness information) exclude the expert opinion of any witness that is offered by any party who has unreasonably failed to make that expert available for deposition]; *City of Fresno v. Harrison* (1984) 154 Cal.App.3d 296, 301 [making a witness “available for deposition” requires more than just the witness’s attendance; it also

requires the witness to be prepared to proffer the opinion he or she has been designated to give at trial]; see generally *Jones v. Moore* (2000) 80 Cal.App.4th 557, 565.)

The trial court also ruled it would consider objections to Robinett's testimony as his testimony unfolded at trial. Thus, Tri/Sam's challenge to any limitations on Robinett's testimony would be better directed to the propriety of the court's rulings specifically sustaining objections to his testimony. Yet Tri/Sam identifies only a single instance in which the court sustained an objection and excluded any aspect of Robinett's testimony: During his direct examination Tri/Sam's counsel asked Robinett, "Does the friction you talked about under the tile come into play in your opinion in this case?" Robinett answered, "Not at all," and asked the court if he could "make a drawing" to explain the "direct bondage system" to which he had earlier referred. Counsel for CDW objected to Robinett's attempt to illustrate his point, asserting Robinett had admitted at his deposition he did not know and was not prepared to testify at that time as to the type of waterproofing material installed at the Palos Verdes residence. The trial court sustained the objection.

Because Tri/Sam made no offer of proof as to what Robinett intended to illustrate, Tri/Sam has not demonstrated the court abused its discretion in sustaining the objection. (See *People v. Williams* (1998) 17 Cal.4th 148, 162, fn. 6 [failure to make the substance of the excluded opinion testimony known to the court bars consideration on appeal of plaintiff's claim it was an abuse of discretion to exclude the evidence]; *Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860, 886 ["failure to make a specific offer of proof constitutes waiver of a contention that the court erroneously excluded evidence"]; *In re Mark C.* (1992) 7 Cal.App.4th 433, 444 ["[f]ailure to make an adequate offer of proof [as to the testimony of an expert witness] precludes consideration of the alleged error on appeal"].)

Even if Tri/Sam could show the illustration was intended to demonstrate why a cleavage sheet was unnecessary—because the waterproofing material was made to bond directly to the thin-set or mortar bed—Robinett essentially testified to those conclusions earlier in the trial. He explained use of a cleavage sheet as a protective barrier over

waterproofing material was outdated technology. Based on the photographs of the demolition of the decks, he had concluded the waterproofing material used on the decks of the Palos Verdes home had been made to directly bond to thin-set or other mortar-based material used to lay the travertine tile.²

Tri/Sam also argues the court's ruling on the motion in limine improperly prevented Robinett from challenging CDW's expert's testimony because Robinett had not reviewed Brown's opinions and conclusions prior to his deposition. Although the court initially imposed this limitation, after further colloquy with counsel and a review of Robinett's deposition transcript revealed that CDW had not made the inquiries at Robinett's deposition that would have foreclosed him from critiquing Brown's conclusions at trial, the court changed this ruling and expressly permitted Robinett to criticize Brown's conclusions.

In sum, even assuming some error in the trial court's evidentiary rulings, Tri/Sam has not satisfied its burden of showing the very limited exclusion of Robinett's proffered drawing or any other limitation on Robinett's testimony resulted in a miscarriage of justice. (See Evid. Code, § 354 ["[a] verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice"]; Code Civ. Proc., § 475 ["[n]o judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial" and that "a different result would have been probable if such error, ruling, instruction or defect had not occurred or

² CDW's counsel acknowledged Robinett's testimony on this point when conducting the direct examination of their own expert, Brown: "Plaintiff came in here and his expert came in here and testified under oath that the use of a cleavage sheet is obsolete and that direct bonding is the way to go now. Do you agree with that analysis?" Brown replied that he disagreed with Robinett because, irrespective of the existence of direct bonding systems, Robinett's opinion conflicted with the recommendations of the Ceramic Tile Institute of America.

existed”]; *Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069; *Zhou v. Unisource Worldwide, Inc.*, *supra*, 157 Cal.App.4th at p. 1480 [prejudice will be not be presumed; burden rests with party claiming error to demonstrate not only error, but also a resulting miscarriage of justice].)

DISPOSITION

The judgment is affirmed. Pablo Leyden Lacuara and Leyden Corporation doing business as CDW Waterproofing are to recover their costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J.

JACKSON , J.